

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TEASTAMENTARY & INTESTATE JURISDICTION
TESTAMENTARY SUIT NO.116 OF 1998
IN
PETITION NO.275 OF 1998

...

Smt.Amita Kulinchandra

Motiwala & Anr.

...Plaintiffs

v/s.

Rohini P. Kapadia

...Defendant

...

Mr.J.Reis with Mr.Rajesh Shah i/b M/s.Gordhandas &
Fozdar for the Plaintiffs.

Mr.Shailesh Shah with Ms.Kavita Brid i/b
Y.M.Choudhari for the Defendant.

...

CORAM: D.K.DESHMUKH, J.

DATED: 6TH JULY, 2007

P.C.:

1. The present suit arises from Testamentary Petition No.275 of 1998. That petition was filed for the probate of the last Will and Testament of Smt.Hirabai Parmanand Kapadia, who expired on 24th August, 1996. The Will of which the probate is sought is dated 25th September, 1996. The deceased left behind her four daughters as her only legal heirs and representatives. The four daughters are, (i) Bhanubai Sunderdas Kapadia; (ii) Amita Kulinchandra Motiwala; (iii) Jyotsna Jairaj Kapadia; (iv) Rohini Pradyuman Kapadia;

2. The petition was filed by two daughters namely Amita Kulinchandra Motiwala and Jyotsna Jairaj Kapadia, who have been named as executors of the Will in the Will. The remaining two daughters were cited as heirs in the probate petition. On being served with the citation, Rohini Kapadia the daughter of the deceased filed her caveat. She also filed an affidavit in support of the caveat objecting to the grant of probate.

3. The cavetrix disputed the Will by contending that she took inspection of the Will lodged in the Testamentary Department and on inspection she found that the Will is invalid, illegal and fraudulently prepared. The cavetrix admits that the signature on the Will is of the deceased mother and that the signatures on the Exhibits annexed to the Will are also that of the mother. But it is contended that the deceased was incapable of understanding the contents of the Will written in English language. That on the letter-head of the deceased, which have been used for the exhibits to the Will, blank space appears between the typed material and the signature and therefore, it is contended that the blank papers which were signed by the deceased have been used to prepare the exhibits of the Will. It is also contended by the cavetrix that the Will is not signed in the presence of the witnesses.

4. Because of the caveat, the probate petition was converted into testamentary suit. On the basis of the rival pleadings the court framed following issues.

I S S U E S

1. Whether the Plaintiffs prove the due execution of the last Will dated 25th September, 1996, by the deceased Hirabai Permanand Kapadia while in sound health and with sound disposing mind?
2. Whether the Defendant proves that the Will dated 25th September, 1996 of the deceased is invalid, illegal, fraudulently prepared as stated in para 3 of the Affidavit in support of the Caveat?
3. Whether the Defendant proves that the signatures of the deceased was taken on blank papers and the Will has been subsequently typed on the same as stated in para 3 of the Affidavit in support of the Caveat?
4. Whether the Defendant proves that the Will has not been signed in the presence of the witnesses as stated in para 3 of the Affidavit in support of the

Caveat?

5. Do the Plaintiffs prove that the Defendant by her conduct has accepted the Will and therefore she is estopped from challenging the validity of the Will?

6. Whether the Defendant proves that the Plaintiffs have undervalued the estate left by the deceased?

7. What reliefs and order?

5. The Plaintiff examined herself. She also examined Shri Virendra G. Trivedi, Advocate as the witness. The Defendant examined herself. The Plaintiff also produced the documentary evidence. The learned Counsel appearing for the Plaintiffs submitted that the Plaintiffs have proved due execution of the Will by leading oral and documentary evidence. The learned Counsel submits that advocate Trivedi who has been examined as a witness by the Plaintiff to prove the execution of the Will has deposed that he drafted the Will. He explained the Will to the deceased and that the deceased has signed

the Will in his presence and that he has attested the signatures of the deceased. It is submitted that the testimony of advocate Trivedi is reliable and thus the execution of the Will has been proved by the Plaintiffs. It was then contended that the cavetrix i.e. the Defendant and her husband both have accepted the properties given to them under the Will and therefore, they are estopped from challenging the Will. The learned Counsel relied on the judgments of the Supreme Court reported in AIR 1995 SC 2086 in Vrindavanibai Sambhaji Mane v/s. Ramchandra Vithal Ganeshkar & ors. as also the judgment of the Division Bench of the Calcutta High Court reported in AIR 1982 Calcutta 599 in the case of Alok Kumar Aich v/s. Asoke Kumar Aich and ors. in support of his submissions.

6. On behalf of the Defendant, on the other hand, it is submitted that the testimony of the witness examined to prove the execution of the Will and the signatures of the deceased on the Will is not reliable. The Plaintiffs have not discharged the burden of proving that Will is a genuine and valid document, and that it was duly signed by the deceased testator. It is claimed that there are number of

discrepancies and contradictions in the deposition of Advocate Mr.Trivedi and therefore, the entire deposition of Advocate Mr.Trivedi is liable to be rejected. It was contended that, though it is true that the Defendant has received certain properties after the death of the deceased, she has received that property as an heir of the deceased and not under the Will. It is submitted that the Plaintiffs have not been able to demonstrate that the ornaments that were given to the Defendant match the ornaments that are to be given to her under the alleged Will. So far as the property received by the husband of the Defendant is concerned, it is submitted that because the husband of the Defendant received the property, estoppel can not operate as against the Defendant. The learned Counsel appearing for both sides took me through the entire documentary and oral evidence. I heard them in detail in relation to oral and documentary evidence.

7. After having heard the submissions of the learned Counsel appearing for both sides, in my opinion, it is necessary to recast the issues, because on the basis of the submissions made by both the sides, it appears that really two issues arise for

consideration, namely

1. Whether the Plaintiffs prove that the deceased signed the Will in presence of the witnesses after having understood the contents of the Will?

2. Whether the Defendant is estopped from challenging the validity of the Will because of her conduct of receiving benefits and properties under the Will?

8. ISSUE NO.1 (Whether the Plaintiffs prove that the deceased signed the Will in presence of the witnesses after having understood the contents of the Will?)

. So far as first issue is concerned, following can be taken as admitted position. i)that the signatures appearing on the Will and annexures appended to the Will are the signature of the deceased; ii) though the deceased signed her name in English language, she did not understand English; iii) that the deceased had made a Will in the year 1988. That Will is with the Plaintiff No.1 and that Will has not been produced on record.

. The defence of the Defendant is that the blank papers which were signed by the deceased have been misused by the Plaintiffs for preparation of the Will and the annexures accompanying the Will. The Defendant says that this is because the signature or initials of the deceased do not appear on all pages of the Will, but only on the last page of the Will and the last page which has the signature of the deceased does not have anything except the name of the deceased, which is typed and the signatures of the two witnesses. The annexures to the Will are on the letter-head of the deceased, the signature of the deceased appears at the bottom of the pages and there is considerable gap between the typed material and the signature.

. According to the Plaintiffs, the deceased expressed her desire to make a fresh Will to the Plaintiffs and therefore, the Plaintiff No.1 contacted Advocate Mr.Trivedi who met the deceased on 15th September, 1996. The deceased instructed advocate Mr.Trivedi about her Will. On the basis of instructions given by the deceased, Advocate Mr.Trivedi prepared the Will in Gujarathi. It was

sent by him to the deceased for her approval. She approved the draft of the Will in Gujarathi and sent it back to him. Thereafter, he translated that into English. She also asked him to be present in the Dispensary of Dr.Dilip Shukla on 25-9-1996 for execution of the Will. Accordingly, he remained present in the Dispensary of Dr.Shukla on 25-9-1996, and there according to Advocate Trivedi the deceased signed the Will and her signature was attested by himself and Dr.Shukla. Thus, according to the Plaintiffs, the signature of the deceased on the Will was attested by two witnesses, i.e. Advocate Trivedi and Dr.Shukla. Dr.Shukla, one of the attesting witness has filed an affidavit dated 9th March, 1998. That affidavit is appended to the probate petition. In that affidavit, Dr.Shukla states that at his dispensary on 25-9-1996 the deceased was present as was he himself and advocate Mr.Trivedi and in their presence " the deceased set and subscribe her name at foot of the testamentary paper in English language and character". Then he states that at the request of the deceased, Advocate Trivedi and he himself "set and subscribe our respective names and signatures at the foot of the said testamentary paper as witnesses thereto". Thus, according to Dr.Shukla the signature

of the deceased on the Will as also the signature of two witnesses is at the foot of the paper. Perusal of the original Will, however, shows exactly to the contrary. The signatures of the deceased and the two witnesses are at the top of the paper and not at the bottom of the paper. The signatures of the deceased are at the bottom of the schedules attached to the Will, but those signatures have not been attested by any of the witnesses. Though, Dr.Shukla is admittedly one of the attesting witness and it is his affidavit which was filed along with the Petition, he has not been examined as a witness by the Plaintiffs and the Plaintiffs have chosen to examine advocate Mr.Trivedi, who is also shown as attesting witness, but he had not filed any affidavit along with the probate petition.

9. So far as deposition of Advocate Mr.Trivedi is concerned, he states that on 14th September, 1996 he was contacted by Plaintiff No.1 for preparing Will of the deceased. At her request, he agreed to visit the deceased. He further states that on 15th September, 1996 at about 12.30 p.m. he visited the deceased at her residence. He states that instructions that were given by the deceased about her Will were jotted down

by him on a paper. He also deposes that the deceased told him that in the body of the Will there should be reference to four schedules indicating the manner in which the ornaments and utensils were to be distributed amongst her daughters and grand daughters. Then, he states that on his inquiry the schedules were shown to him. They were typed in English on letter-head of the deceased. He states that she wanted her Will to be prepared in English, because her earlier Will was in English. She also said that to understand the contents of the Will, the draft of the Will should be prepared in Gujarathi. He further deposes that she informed him that she would request her family Doctor to attest her signature on the Will. She also requested him, according to the witness, to be other attesting witness. Then he deposes that on the basis of the instructions given by the deceased, he prepared draft of the Will in Gujarathi. When the draft was ready he contacted the deceased on telephone. She sent somebody to collect the draft. After a day or two on receiving the draft, the deceased contacted him on telephone and told him that she had gone through the draft and she found that it was as per the instructions. Therefore, she asked me to translate

the draft into English. She also informed him that he should be remain present at 11 a.m. on 25-9-1996 in the clinic of Dr.Shukla, where she would execute the Will. He states that accordingly he got the Will translated into English and engrossed the Will. He remained present in the clinic of Dr.Shukla as asked by the deceased, where the deceased was also present. He states that he explained the contents of the Will to the deceased. The deceased handed over to him four annexures of the Will, which were already signed by her. He attached those schedules to the Will and then in his presence and in the presence of Dr.Shukla the deceased signed the Will and put the date 25-9-1996 below her signature. He states that thereafter he and Dr.Shukla both signed the Will. Perusal of the deposition of this witness shows that there are contradictions at several places. In the examination-in-chief, this witness categorically states that when he visited the deceased at her residence on 15-9-1996 " On my inquiry as to what the schedule contains. She showed me four schedules typed in English on her letter-head". In his cross-examination he states thus

" Que: When did you for the first time see four

schedules attached to the Will?

Ans: In the Dispensary of Dr.Shukla when the Will was to be executed."

In the examination-in-chief the witness says that he met the deceased on 15-9-1996. He took about 3 to 4 days to prepare the draft of the Will. Thereafter the draft was collected from him by one of the employee of the deceased. After 1 or 2 days of the draft being collected, the deceased contacted him on telephone and asked him to prepare the final Will in English and also informed him that the Will is to be executed on 25-9-1996 in the dispensary of Dr.Shukla. According to examination-in-chief, there is only one communication between the deceased and the witness, where the deceased told him to prepare the final Will and also the venue where the Will was to be executed. The witness in his cross-examination states that he was told by the deceased that the Will was to be executed on 25-9-1996 at the clinic of Dr.Shukla on 24-9-1996. He also states that he took two days to translate the Will from Gujarathi language to English language, after Gujarathi version was approved by the deceased. Then he is asked as to why he did not type

the name of the witnesses and addresses on the Will. He says that when he came to know the names of the witnesses the Will was already typed. He also states that the Will was typed one or two days before 24-9-1996. Thus, these are clear discrepancies in the deposition of this witness about the time he received instructions from the deceased about the execution of the Will. When the witness is asked why he did not type the name of the witnesses, when he typed the Will in English. He says that he did not type Dr.Shukla's name because that name was told to him by the deceased when the Will was already typed and when he is asked why he did not type his own name as a witness on the Will, he states that he did not type his own name because his name was on the docket of the Will. These discrepancies and contradictions in the deposition of this witness indicate that without being corroborated on material aspects this witness cannot be relied on. In the examination-in-chief this witness states that the deceased told him that he should prepare a draft of the Will in Gujarathi language, so that she understands it. In cross-examination, however, he states that the deceased told him that she was able to follow the contents in English. The witness is a

lawyer by profession. He states that he took the instructions of the deceased on a piece of paper, but he does not have that piece of paper. He categorically states that he prepared the draft of the Will in Gujarathi, which was approved by the testator, but he is not in a position to produce that and in cross-examination he categorically states that except his words that draft of the Will is prepared in Gujarathi there is no other evidence.

. In my opinion, one more aspect which is clinching is that there are two attesting witnesses to the Will. It is true that it is not necessary that both the attesting witnesses should be examined. But when out of two attesting witnesses, the Plaintiffs have chosen to file affidavit of one witness with the petition, the Plaintiffs have to come out with some explanation as to why that person was not examined as a witness in the case. In my opinion, considering the contradictions and discrepancies in the deposition of Advocate Mr.Trivedi, who is the only witness who claims to have seen the deceased signing the Will, without this witness being corroborated, his testimony cannot be accepted. One more aspect that has to be noted here is that the other attesting

witness Dr.Shukla has filed his affidavit and in his affidavit he states that the deceased has signed at the bottom of the page. Thus, there is a clear contradiction in the version given by Dr.Shukla about the place where the deceased signed the Will and the deposition of Advocate Mr.Trivedi. It is to be noted here that acceptance of the Will as a valid document has drastic consequence. Two of the four daughters of the deceased, if the Will is accepted as valid, are totally excluded from any share in the immoveable properties of the deceased, which is of considerable value. In my opinion, therefore, unless there is a clinching evidence proving the fact that the deceased has actually signed the Will, a finding cannot be recorded that the Will was actually signed by the deceased.

. Taking overall view of the matter, therefore, in my opinion, it cannot be said that the Plaintiff has discharged the burden of proving that the deceased has signed the Will in the presence of two witnesses as claimed. Issue No.1 is, thus, accordingly answered in the negative.

10. ISSUE NO.2: (Whether the Defendant is estopped from challenging the validity of the Will because of her conduct of receiving benefits and properties under the Will?)

. According to the Plaintiffs, as the Defendant has accepted certain ornaments after the death of the deceased to which she was entitled under the Will, she was estopped from challenging the validity of the Will. It is an admitted position that after the death of the testator, certain ornaments were handed over to the Plaintiffs. It is also an admitted position that according to the schedule attached to the Will, the Defendant is entitled to receive certain ornaments which are mentioned in the schedule. But perusal of the record shows that the Plaintiffs have not made even an attempt to show that what was handed over to the Defendant was as per the Will. If it is the case of the Plaintiffs that ornaments to which the Defendant becomes entitled which are described in the schedule annexed to the Will have been handed over to the Defendant, then it was easy for the Plaintiffs to prove that because the schedules of the Will are on record and there is also on record the documents showing what were the

ornaments received by the Defendant. But absence of any attempt on the part of the Plaintiffs to compare the list of the ornaments which were handed over to the Defendant, in my opinion, leads one to draw an inference that had the Plaintiffs made such an attempt, it would have been revealed that ornaments have not been handed over to the Defendant under the Will. It was contended that there is an endorsement made on the list of ornaments in English language, that ornaments as per the Will have been handed over. But it is an admitted position that that endorsement is not made by Plaintiff No.1, who has been examined as a witness, but by Plaintiff No.2 who has not been examined as a witness, and there is no evidence on record that endorsement was present when the Defendant signed the document. The Defendant was entitled to receive ornaments left behind by her mother, even without any Will as an heir of the deceased. Therefore, unless it is established on record that she has received after the death of the testator some properties to which she was not entitled, except by virtue of the Will, there is no question of operating any estoppel against the Defendant. In this regard a submission was made that the husband of the Defendant has received certain

properties, which he was directed to be given by the Will. It is not in dispute that the husband of the Defendant has received certain property and that property comes to him only because of the Will and otherwise independently of the Will he is not entitled to the property. Therefore, had the husband of the Defendant been challenging the Will, estoppel will perfectly operate against him and prevent him from challenging the Will. But the Will is not challenged by the husband of the Defendant, but by the Defendant. In my opinion, estoppel cannot be operated against the Defendant because of the conduct of the husband of the Defendant. In my opinion, therefore, it cannot be said that estoppel because of the conduct of the Defendant operates to prevent the Defendant from challenging validity of the Will.

11. Taking overall view of the matter, therefore, issue No.2 is answered accordingly.

12. In view of the answers given to the issues framed above, the suit has to be dismissed. It is accordingly dismissed. Plaintiffs are directed to pay costs to the Defendant, as incurred by the Defendant.

...